IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.266 OF 2003.

Dinkar Pundalik Powar ..Appellant

Versus

Atmaram Dadu Powar ..Respondent

Mr.M.R.Suryavanshi for the appellant

Mr.V.B.Rajure for the respondent

CORAM: S.R.SATHE, J.

DATE : 24th June, 2005

P.C.

1. Heard the learned Advocates for the Appellant and the Respondent.

2. Perused the papers.

3. Appellant, the Original Defendant, against whom decree for injunction was passed and direction was given that he should open the window of Plaintiff and remove the construction carried out by him infront of the said window to the extent of 9 feet height from the window, has filed the present appeal, as the decree passed by the trial Court regarding injunction was also confirmed by the First Appellate Court.

4. The house property bearing City Survey No.117 situated at Village Siddhanerli, Tal: Kagal is owned by the Plaintiff-respondent. To the west side of the said house there was open space owned by the Defendant to the present appeal. In the year 1972 the Plaintiff carried out construction and kept one window in the western side wall. He was enjoying light and air through the said window. On 24.2.1994 the Appellant-Defendant started construction of house in the open plot. The said construction was abutting the window of the Plaintiff's house. Naturally, the plaintiff filed the suit for permanent and mandatory injunction restraining defendant from carrying out any further construction and also prayed for mandatory injunction directing the Defendant to remove the construction which was infront of the western side window of the Plaintiff's property.

5. After considering the evidence adduced by both the parties, the Trial Cour came to the conslusion that the Plaintiff has a right of Easement by necessity and the Defendant has carried out the construction and thereby affected the Plaintiff's right. Hence mandatory injunction was granted against the Defendant. The said order was confirmed by the First Appellate

Court.

6. The learned Advocate for the Appellant submitted that even if it is held that some part of the construction carried out by the Appellant-Defendant has obstructed the light and air of the Respondent, even then, the order for mandatory injunction is not legal and valid because the Plaintiff-Respondent had not shown that as a result of the Construction carried out by the Defendant Plaintiff could not use his property for residence. However, it is to be mentioned that admittedly after service of notice of the suit, the Defendant persisted with the construction, so under such circumstances, the Appellant-Defendant is in fact not entitled to contend that the Plaintiff is not entitled for mandatory injunction. The Defendant completed the construction and took risk, though the suit was pending. As the Plaintiff proved his easementary right, the Courts below after considering the entire evidence in its proper perspective, correctly passed decree for mandatory injunction. There is no substantial question of law invloved in the matter. Hence appeal is dismissed in limine.

5. However, the decree is not to be executed till 30.8.2005.

(S.R.SATHE, J.)